

CROATIA: Mirko Graorac

Shortchanging Justice -- War crimes trials in former Yugoslavia

Introduction

The hundreds of thousands of victims, or their relatives, of violations of humanitarian law committed in former Yugoslavia deserve justice. The International Criminal Tribunal for the former Yugoslavia (the Tribunal) was established precisely for that purpose. Although it can exert primacy, the mandate of the Tribunal is concurrent with national courts. In Slovenia, Croatia, Bosnia-Herzegovina, and the Federal Republic of Yugoslavia more than one hundred people -- well over four times the number in the Tribunal's detention -- face or have been convicted of, nationally-defined war crimes charges. A handful of them were arrested by those for whom they fought during the armed conflict, either because they confessed to committing crimes themselves or were implicated by others. Most detainees or prisoners, however, are former adherents of an opposing side to their captors; they were primarily detained in the last stages of the conflict or arrested afterwards when they travelled to the territory now controlled by their former enemy.

In many cases, trials for violations where defendants are being tried by their former enemy have been simply show-trials, with the defendants convicted by the media and public opinion before the trial has even started. Evidence from international monitors and collected by Amnesty International suggests that virtually none of the trials which are ongoing or have been completed have met international standards for fairness. Violations of fair trial standards include the inability of the defence to present evidence on equal terms with the prosecution, the prevention of suspects from conducting a defence, as well as the inclusion of testimony which was obtained as a result of torture or ill-treatment.

The consequences of these trials has been to make a sham of justice. They reinforce the feelings of all parties that individuals are not being held responsible for acts they committed, but that it is the collective which has been found guilty. The fear of being unfairly and possibly unjustly convicted is perpetuating the divisions intended by the wars. Men, particularly if they served in the military, are afraid of travelling to, let alone returning to live in, areas controlled by their former enemy, afraid that they too will be arrested and unfairly convicted for crimes in which they may have played no role. While it is crucial to the long-term stability of the region that those responsible for grave violations of humanitarian law be brought to justice, it is equally important that such justice is fairly administered. Victims and their relatives deserve that justice be done properly.

One trial which did not meet international standards for fairness was that of Mirko Graorac, sentenced to 20 years' imprisonment and expulsion from Croatia. Mirko Graorac was denied the opportunity to summon witnesses or otherwise conduct his defence, and the identification process of Mirko Graorac by witnesses, which was the primary basis for the judgment, may have violated Croatian procedural obligations. The Supreme Court, although ordering a retrial to establish one circumstance, confirmed most aspects of the first-instance

court's failures in its consideration of Mirko Graorac's appeal. Amnesty International fears that the retrial which is currently waiting to be scheduled by the Split County Court will not remedy the violations which occurred in the initial proceedings, and may result in a miscarriage of justice.

The trial of Mirko Graorac: an overview

On 22 April 1996 the Split County Court found ethnic Serb Mirko Graorac guilty of committing war crimes against a civilian population and, concurrently, war crimes against prisoners of war while he was the commander of the "external guard" of the militia in Manja..a prison camp, Bosnia-Herzegovina, from April until September 1992.¹ The judgment states that he is guilty as commander for acts committed by his subordinates, as well as several acts he allegedly carried out himself. In particular, the court found him guilty of the following specific acts:

- C that members of the "external guard" which he commanded participated in the systematic beating of detainees in Manja..a camp, who had already been wounded by earlier beatings;
- C that Mirko Graorac himself on several occasions beat detainees;
- C that members of the "external guards" searched detained persons, took from them valuable objects and participated in night-time "roll-call", which resulted in serious beatings of detainees including some to their death;
- C that because of these conditions in the camp some detainees received serious bodily injuries including [witnesses at the trial]: VU, who had four ribs broken; BD, who lost all his teeth; TB, who lost one tooth; and bruises sustained by these named individuals and others;
- C that he participated in the illegal detention of civilians in a concentration camp.

However, the court refused to allow the defence to summon witnesses, may have committed serious procedural violations, and otherwise prevented Mirko Graorac's lawyer from conducting a defence -- in violation of international standards for a fair trial and Croatian constitutional guarantees.

¹The judgment in particular cited Article 3, 13, 27, 32 and 33 of the *Geneva Convention Relative to the Protection of Civilian Persons in time of War of August 12, 1949*; Article 4 of *Additional Protocol II*; and Article 3, 13 and 14 of the *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*.

The defence appealed the judgment on the basis of severe violations of criminal procedure, violations of the criminal law, and wrongful and incomplete establishment of the facts. On 17 February 1998 the Supreme Court ruled in favour of the defence appeal on one of these grounds. It returned the case to the Split County Court for retrial, but only to establish the status of the former detainees who testified at the trial. Several witnesses had testified that they had been soldiers on active service with the Croatian Army at the time they were taken prisoner in Bosnia-Herzegovina in early 1992. The Supreme Court stated that the acceptance by the court of those facts could have "far-reaching consequences for Croatia", presumably because it incriminates Croatia in the war in Bosnia-Herzegovina. The Supreme Court rejected the defence appeal's objections regarding procedural wrongdoing and insufficient evidence. Mirko Graorac's lawyer was not informed of or present when the Supreme Court considered the appeal, due to legislation which suspends the duty of the court to inform the parties about its sessions (although it does not exclude the possibility), although he had specifically requested to be informed so that he could be present.²

Mirko Graorac was born in Bajinci, a village in Srbac municipality in northern Bosnia-Herzegovina in 1942; he is of Serb nationality. He lived in Split, Croatia, from 1964 and worked as a police officer until January 1991, when he retired. His family lives in Croatia. His 1992 application for recognition as a Croatian citizen was denied.

Amnesty International is concerned that Mirko Graorac was convicted of war crimes by the Split County Court in 1996 in a trial which did not meet international standards and Croatian constitutional guarantees for a fair trial. The organization is further concerned that the Croatian Supreme Court did not acknowledge or consider these aspects in its decision to order a retrial. Amnesty International fears that the retrial in the Split County Court also risks being unfair and may result in a miscarriage of justice. Amnesty International urges the Croatian authorities to ensure that any retrial of Mirko Graorac allow for a remedy of the serious violations of international fair trial standards, in particular by allowing the defence to summon witnesses, challenge prosecution evidence, and otherwise to conduct a defence. As an additional measure, the organization recommends that the Croatian authorities give the International Criminal Tribunal for the former Yugoslavia an opportunity to review the investigation file and advise on whether the evidence is sufficient for prosecution in a national court, in accordance with an international agreement signed by Croatia in 1996. Amnesty International also calls on the Croatian authorities to launch a full, independent and impartial investigation into the allegations that Mirko Graorac was tortured or ill-treated during the initial stages of his detention.

²Article 20 of the "Law on Criminal Procedure in the situation of war or immediate danger to the independence and integrity of Croatia," (*Zakon o krivi..nom postupku u slu..aju ratnog stanja ili neposredne ugroženosti neovisnosti i jedinstvenosti Republike Hrvatske*).

Background information

Manja...a was the name given to a Bosnian Serb detention camp in Bosnia-Herzegovina in 1992 where thousands of prisoners of conscience were detained because of their nationality. They, as well as prisoners of war also detained at Manja...a, were the subject of human rights violations including deliberate and arbitrary killings, torture and ill-treatment. Manja...a is actually the name of a mountain; the camp, a converted cattle farm, was located in this mountainous area on or near a former Yugoslav National Army (JNA) base approximately 25 kilometres south of Banja Luka.³ Although Manja...a was used as a prisoner of war camp for Croatian soldiers captured by the JNA in the second half of 1991, from April or May 1992 until December 1992 Manja...a primarily held civilians, the majority Bosniacs (Bosnian Muslims) but also some Bosnian Croats. The International Committee of the Red Cross (ICRC) regularly visited and registered prisoners in Manja...a camp from July 1992. It reported that as of mid-August 1992 there were 3,737 prisoners held there.

According to witnesses who were former Manja...a inmates who testified at Mirko Graovac's trial, there were two types of guards at the camp: the "external guards" patrolled the exterior of the camp (outside the barbed wire) and were responsible for securing access and preventing escape, while "internal guards" were responsible for monitoring and guarding the prisoners on the inside of the camp. At Manja...a camp, prisoners were deliberately and arbitrarily killed, tortured and ill-treated, and conditions were inhumane. Former inmates of Manja...a camp interviewed by Amnesty International in August 1992, less than three weeks after their release, still complained of health problems and were clearly in poor physical condition, allegedly as a result of beatings and poor conditions in the camp; some still bore bruises they claimed were a result of ill-treatment.⁴ Amnesty International supports all efforts to bring to justice those responsible for the gross violations of fundamental human rights and humanitarian law committed at Manja...a camp. The failure to do so within international standards however, is not only a violation of the rights of any person who is unfairly convicted, it is also an injustice to the victims of the gross abuses committed at Manja...a who deserve proper justice for their suffering.

The Tribunal was created to prosecute those responsible for serious violations of international humanitarian law, its jurisdiction is concurrent with that of national courts (although it has primacy and state must defer a particular case if so requested). Prosecutions for offences

³This and the following unattributed information about Manja...a camp is taken from the *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. S/1994/674, 27 May 1994, Volume 4 - Annex VIII "Prison Camps", paras 252 - 407.

⁴See *Bosnia-Herzegovina: Gross abuses of basic human rights*, (AI Index: EUR 63/01/92), October 1992, p. 24.

committed during the armed conflicts in former Yugoslavia have been brought to courts in Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia, as well as other states including Austria, Denmark, Germany and Switzerland. The Tribunal's Prosecutor has confirmed the concurrent role of national courts in Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia, and has stated that she expects national courts to pursue prosecutions of some cases which the Prosecutor has deemed not to be a priority for the Tribunal's purposes. To facilitate the relationship between the Tribunal and trials in national courts in the region, the Presidents of Bosnia-Herzegovina, Croatia, and the Federal Republic of Yugoslavia on 18 February 1996 in Rome, Italy, signed an agreement, which included as one of its seven provisions that "persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal" (this agreement is known informally as "Rules of the Road"). One of its original motivations was to increase confidence of those exercising freedom of movement following a number of arbitrary arrests in Bosnia-Herzegovina of suspects who crossed into territory controlled by their former adversaries after the General Framework Agreement for Peace in Bosnia and Herzegovina (Bosnia-Herzegovina Peace Agreement) went into effect. The Rome Agreement as a whole contained measures to strengthen and advance the Bosnia-Herzegovina Peace Agreement, and it was signed by Croatian President Franjo Tudjman and Federal Republic of Yugoslavia President Slobodan Milošević as guarantors. Formal mechanisms for implementing the "Rules of the Road" have long been established. In at least the Federation of Bosnia-Herzegovina they are considered legally to have an obligatory character, and national human rights institutions have ruled that arrests made in violation of it breached the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).⁵ In practice, implementation of the Rules of the Road has meant that before pursuing an arrest, prosecutors forward the entire case file to the office of the Tribunal Prosecutor which reviews it and responds, indicating whether it deems the evidence is sufficient to justify an arrest and if so whether it wants to pursue the prosecution itself or refers the case back to national courts. The Tribunal does not monitor the progress of any subsequent proceedings. The authorities in Croatia have never specifically stated that the Rome Agreement is not applicable to Croatia, however to Amnesty International's knowledge they do not send nationally defined war crimes case files to the Tribunal before pursuing prosecutions, even in cases of crimes allegedly committed in Bosnia-Herzegovina. Although Mirko Graorac was arrested before the Rules of the Road were agreed in February 1996, his trial began after the agreement had been signed.

⁵See "Decision on the admissibility and merits delivered on 18 February 1998 of Samy Hermas against the Federation of Bosnia and Herzegovina", Human Rights Chamber for Bosnia and Herzegovina, Case No. CH/97/45.

War crimes, as well as other violations of international humanitarian law and crimes against humanity, are specifically defined as criminal acts in Croatian law. As Mirko Graorac was denied Croatian citizenship, the court justified his prosecution by citing legal provisions enabling prosecution of foreign nationals who commit crimes against Croatian citizens. Croatia is also a party to the Geneva Conventions of August 12, 1949, which obliges states to bring to justice all people, regardless of nationality, responsible for grave breaches of the Convention.

Mirko Graorac was not only accused of crimes he committed directly, he also is accused of, as a commander, being responsible for acts of his subordinates. Those who are in a position of superior authority do bear a criminal responsibility for ensuring that human rights violations are not committed. However, the Tribunal has stated that "it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences." („, *elebifi* judgment, para 378).

Legal Proceedings

The following analysis is based on documents relating to the trial of Mirko Graorac including the indictment, Split County Court and Supreme Court judgments, his lawyer's appeal, official court records from the pre-trial, investigative, and main trial proceedings as well as reports from independent monitors attending the trial including representatives of the Helsinki Committee for Human Rights in Croatia and Otvorene O..i, an international non-governmental organization.

Mirko Graorac was arrested on 29 April 1995 on suspicion of committing the act of "participating in an enemy activity", but was indicted, based on information which emerged during the investigation, for war crimes against prisoners of war (Article 122 of the Criminal Code then in effect) on 23 May 1995. After all the prosecution witnesses had been heard in the main trial, the prosecution amended the indictment to include the additional charge of war crimes against a civilian population (Article 120 of the Criminal Code), and specified additional specific acts, for example participating in the illegal detention of civilians and withholding medical treatment from prisoners.

Mirko Graorac stated that upon arrest he was tortured, allegedly because he refused to be examined with polygraph testing. His wife described to Amnesty International delegates that when she first visited her husband in detention in May 1995, approximately two weeks after his arrest, he was "completely blue". Mirko Graorac described being beaten while suspended in air by his hands, naked, and being additionally beaten while forced to stand with his hands against a wall. One of the people Mirko Graorac named as responsible for this ill-treatment, VU, was a key prosecution witness (see below). Mirko Graorac testified at his main hearing that although

his wounds had been visible when he was taken before the investigating magistrate, the magistrate did not ask him any questions and he did not volunteer any information as he was still in "abnormal fear." Although no statement was elicited from Mirko Graorac as a result of the torture that was later used as evidence in the trial (so the torture to which he was alleged to have been subjected does not directly bear on the fairness or unfairness of his trial), the organization is gravely concerned that the court was dismissive of these allegations of ill-treatment. Moreover, the effect of the torture may well have intimidated Mirko Graorac and had an adverse impact on his ability to prepare his defence, contrary to Article 6 of the European Convention and Article 14(3)(6) of the International Covenant on Civil and Political Rights (ICCPR).

On 3 May 1995, two people, VU and ĐT, later summoned as prosecution witnesses, were called to choose Mirko Graorac from a line-up. The official record from that identification notes that Mirko Graorac claimed that VU had participated in his interrogation. Before the interrogation and again during the trial, VU testified that he had already been shown a picture of Mirko Graorac before the identification; when asked in the main trial about how he first identified Mirko Graorac, VU testified that Mirko Graorac had been brought before him, alone -- therefore not during the line-up. During the main trial, Mirko Graorac claimed that the other individual who identified him on 3 May 1995, ĐT, had been brought into the room where he was being interrogated (in advance of the identification) and was told to "take a good look." Another person, BD, was also called to choose Mirko Graorac out of a line-up two weeks later; this witness also testified that he had been shown a photograph of Mirko Graorac in advance of the line-up.

After the investigative proceedings, significant media coverage was given in Croatia to the arrest and charges against Mirko Graorac. The media, including both print media and television, reported details of the indictment shortly after it was issued on 23 May 1995 as well as personal details about Mirko Graorac. For example, the newspaper *Slobodna Dalmacija*, which is printed in Split but distributed also in Bosnia-Herzegovina and in Europe, printed his photograph on the front page, and on 26 May 1995 printed an article with the headline "In Manja...a Criminal, But in Split Beloved Neighbour", as well as details about the statements given by the three witnesses who had been heard in investigative proceedings.

The main trial in Split County Court, was held on 10 days in March and April 1996.

Summary of Prosecution case

Ten prosecution witnesses testified against Mirko Graorac in the main hearing of the trial, and their testimony was the only evidence linking Mirko Graorac to the camp where the crimes allegedly occurred. No material evidence was introduced in support of witnesses' testimonies that they had seen Mirko Graorac at the camp. As noted above, three of the witnesses (VU,

ĐT and BD) had also been heard in pre-trial proceedings; five others were summoned for the main hearing and two additional witnesses voluntarily came forward when they heard (via the media) about the trial. Additionally, the prosecution submitted as evidence general information about the conditions in Manja..a camp through newspaper articles and video cassettes, and materials used to discredit Mirko Graorac's defence such as court documents for previous civil suits in which Mirko Graorac had been engaged.

The bulk of most witnesses' testimony concerned their experiences in Manja..a camp; although most were former soldiers at least one was a civilian. Many testified about acts of killings, torture and ill-treatment as well as the inhumane conditions to which they had been subjected, although they did not always indicate or differentiate between the types of guards who had committed the acts. Many testified about nighttime "roll-calls", when prisoners would be called out of their barracks by name in the presence of both the "internal" and "external" camp guards. Eight witnesses were able to identify Mirko Graorac as having been present at Manja..a, three (VU, BD, and IV) said that they had seen Mirko Graorac repeatedly during their internment. Four (ĐT, TB, IZ and SZ) said that they saw him on individual occasions, none specified more than four times. The other (DDñ) testified that he "somehow came to the conclusion" that Mirko Graorac was a guard described to him by another former prisoner (who was not a witness) before the trial, but did not himself cite any specific examples of when he himself saw Mirko Graorac at Manja..a.

With regard to the substantive elements of the witnesses' testimony, the first witness to testify against Mirko Graorac, VU, provided the most detail about Mirko Graorac's involvement at Manja..a camp, and his testimony was particularly important to the prosecution. He testified that Mirko Graorac had questioned him when he first arrived at the camp, and that they had a conversation about Split; he said he later heard his name from other prisoners and also heard from those prisoners that Mirko Graorac was the commander of the external guard of the reserve militia. This witness testified that he had seen Mirko Graorac take part in night-time "roll-calls" where prisoners would be beaten, including one time when a prominent Bosniac was killed. He said that Mirko Graorac had personally beaten him on one occasion with a thick telephone cable.

Regarding other aspects of the witnesses testimonies in terms of violations which directly implicated Mirko Graorac, one alleged incident was particularly important. Three of the witnesses (VU, ĐT, and SZ) had been admitted to Manja..a at the same time, in May 1992. Although all three testified that they had seen Mirko Graorac on that occasion, their testimony differed in minor and essential points about how the admittance took place. Two of the witnesses, (VU and ĐT) stated that they had been beaten at that time. While, as noted above, VU said that Mirko Graorac had beaten him with a cable, ĐT testified that he had never seen Mirko Graorac beat any prisoners, and claimed he had seen Mirko Graorac when the truck in which they had been transported was unloaded. However, the other witness (SZ, who had not

been heard during pre-criminal procedures) said that they had not been beaten at the time of their admittance to Manja...a. The witnesses' testimony also differed in the descriptions of the uniform Mirko Graorac was wearing at the time: while VU said that Mirko Graorac had been wearing a green and yellow camouflage sleeveless jacket, and SZ said that he was wearing a greyish olive former Yugoslav Army uniform (which he had earlier described as different from camouflage uniforms which other guards wore), ĐT had said he wore the uniform of the reserve militia which was described as being blue.

Of the other witnesses, one other, IV, said that Mirko Graorac had beaten him on his admission to Manja...a (at a different time from when VU, ĐT and SZ were admitted to the camp), kicking him in the knee and twice in the body; he stated this took place late at night. IV testified that after that beating he never again had contact with the defendant, although he saw him on occasion through the barbed wire. The only other witness to directly incriminate Mirko Graorac in any specific acts, (BD) stated that he had seen Mirko Graorac beat IV once during the day inside the camp about 15 days after their arrival in the camp (which thus contradicted IV's own testimony); BD also stated that he believed that Mirko Graorac had been one among a group of guards who had beaten him on one occasion.

Regarding Mirko Graorac's role as alleged camp commander, six of the witnesses testified that Mirko Graorac was the commander of the external guard, although no explanation was entered into the court record for one of them (BD) as to how he knew that Mirko Graorac was the commander. The other five witnesses said they knew (either by name or by his face) that Mirko Graorac was the commander of the external guard because other prisoners spoke of it. One witness stated that he knew that Mirko Graorac was commander because he would hear others make reference to having obtained "orders from Graorac" (ĐT), and another witness said that he had on one occasion seen Mirko Graorac deploy other "external guards" when the prisoners were taken out of the camp to undergo labour (TB). No material or other evidence was introduced to support the allegations that Mirko Graorac was indeed camp commander, or any attempt made to specify the hierarchy of the camp command, that of the external guards, or what the commander's responsibilities and role had been.

Summary of defence case

In Croatian criminal procedures, the defendant (if he so chooses) can testify immediately after the charges are read against him, and also has an opportunity to be called as a witness after prosecution witnesses have been heard. Mirko Graorac testified on both occasions.

In his first statement, Mirko Graorac pleaded not guilty to all the charges against him; he stated that he spent the entire time he was in Bosnia-Herzegovina in his home village of Bajinci, never served with any Bosnian Serb military or civilian units, and that he had never been to Manja...a camp, let alone acted as a commander of its guards.

According to Mirko Graorac and his family, he left Croatia in early May 1992 in order to care for his ill and elderly parents, who were in Bajinci. At that time a cease-fire had been in effect in Croatia for several months, and armed conflict was emerging in Bosnia-Herzegovina. As was common practice for those travelling during that time, he received authorization from the Croatian authorities to travel to Bajinci. Bajinci is located in the north of Bosnia-Herzegovina, in what is now Republika Srpska, approximately 40 kilometres north of Banja Luka, very near the border with Croatia. His mother died shortly after his arrival. According to Mirko Graorac, the deteriorating security situation rendered his immediate return impossible and, in any case, his father was also seriously ill and needed care. His father died in April 1993, and after that time Mirko Graorac claims he made every effort to return to Croatia, including making approaches to representatives of the Roman Catholic church and the Banja Luka branch of Croatia's ruling political party, the Croatian Democratic Community (HDZ). He returned to Croatia March 1994 at which point he was questioned by the police about the time spent in Bosnia-Herzegovina.

Mirko Graorac's wife was also called as a witness and testified to his character, the status of their marriage and his whereabouts. She was the only witness the court permitted to testify in support of Mirko Graorac's testimony, although she was actually called by the prosecution.

When Mirko Graorac again took the witness stand following the hearing of prosecution witnesses, he testified in detail about the circumstances of his arrival back in Croatia, and claimed that at that time he had been detained by secret police officers, ill-treated, and instructed to become an informer about other Croatian Serbs who had returned to Croatia from the Federal Republic of Yugoslavia. He claimed that it was secret service officers who arrested him on 29 April 1995, and complained about his subsequent ill-treatment in which VU allegedly participated, described above. He also stated that on the night of 30 April, one officer brought a number of people, among them ĐT, into the room and said "take a good look" (although he had not raised this claim when ĐT himself testified).

The defence was only permitted to submit documentary evidence, not testimony, of alibi or character witnesses. It was permitted to submit documents relating to the death of Mirko Graorac's parents, documents relating to his requests and attempts to return to Croatia including submissions from representatives of the HDZ in Banja Luka and the Roman Catholic church in Bosnia-Herzegovina dating from the time that Mirko Graorac stated he was attempting to return to Croatia. The defence also submitted affidavits from citizens of Bajinci, notarized in the offices of the HDZ in Banja Luka, testifying to his alibi. However, the court rejected all the proposals that defence witnesses be called. The court rejected defence proposals to hear two witnesses resident in Slovenia and a number of residents of Bajinci village who could provide information about Mirko Graorac's alibi, a local Croatian politician living across the border from Bajinci who had travelled there during the war who was to testify about the situation in the

village, and information from the Commission of Experts in Chicago (which collected information on war crimes in advance of the Tribunal's establishment) and the Bosnia-Herzegovina state commission for war crimes about Manja...a camp. The court rejected all the proposals as "excessive [*suvišni*], bearing in mind the results of this procedure up until this point." (Split County Court record of 2 April 1996).

Amendment of indictment

A new indictment against Mirko Graorac was presented on 17 April 1996, and many substantive elements were changed; for example, it introduced the crime of war crimes against a civilian population. It also included the acts of confiscation of valuables and failure to provide medical assistance, neither of which were in the original indictment and about which the defence nor court had not questioned the witnesses. Nonetheless, the Split County Court refused to re-hear the witnesses, citing that it would prolong the criminal procedure.

Violations of international standards

The European Convention, ratified by Croatia in November 1997, in Article 6 entitles everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and grants everyone charged with a criminal offence certain minimal rights. The constitution of Croatia similarly institutionalizes the right of anyone suspected or accused of a penal offence the right to a fair trial (Article 29).

Violation of the principle of "equality of arms"

One of the rights of a fair trial according to the European Convention, is the right of the accused to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them (Article 6(3)(d)).

As noted above, all the defence witnesses and evidence proposed by Mirko Graorac's lawyer were rejected by the Split County Court. The prosecution, however, was allowed to submit evidence such as video cassettes filmed by foreign television crews and articles about human rights violations in Manja...a camp printed in Croatian and Bosnian newspapers as general information about Manja...a camp. Prosecution witnesses had been summoned from the United Kingdom and Switzerland (although in some cases unsuccessfully; for example, in the case of the United Kingdom the witnesses did not have travel documents enabling their travel to Croatia). In the judgment, the Split County Court elaborated on the reasons that the proposed defence witnesses were rejected:

"these are residents of Bajinci village, and it is necessary to say that in fact these are witnesses whose residency is or who at least originate from the accused's region, and which in this concrete case belongs to the enemy side. Even considering and regardless of the fact that the defence has alleged that some of the witnesses are of Croatian heritage, it must be stated that these are people who chose membership to that warring side, and in any case following their testimony must return to live in that surrounding...." (Page 21 of the Split County Court Judgment).

The Split County Court further rejected the defence's suggestion that the United Nations assist in facilitating the proposed witnesses to come to Croatia by stating:

"Namely, it isn't disputed that Bajinci is in an area which is located inside the so-called 'Republika Srpska.' It is not necessary to draw particular attention to the fact that this is the type of para-state entity which is in actuality the aggressor on the territory of Croatia as well as in the Republic of Bosnia-Herzegovina, which has practically no influence on that territory. We are witnesses of the insanity of that aggression, the hatred which it bore and the evil which it created, and above all, now as objective evidence we would be asked to hear members of that para-state entity, who under the wing of the UN would come and tell the truth in a case which their enemy state is conducting against their co-villager!" (Punctuation as in original, page 21 of the Split County Court Judgment)

The Split County Court also rejected defence witnesses who were to testify about the general conditions in Manja..a camp, in particular seeking independent sources of information about the camp leadership. In its judgment, the court explained the rejection by stating

"firstly it must be said that this procedure is being run by judicial institutions of an independent and internationally recognized state, which has its own institutions. To that regard it must be said that during the procedure much evidence was presented which had been collected by institutions which are constitutionally competent to do so. With that it is truly excessive to suggest collecting information about something which already exists in this state, not to mention for example the University of Chicago which comes to information only via data submitted to it by others, including by this state given that this state was the victim of many war crimes." Split County Court Judgment, Page 22)

The Supreme Court did not directly respond to the violations of criminal procedure alleged by the defence with regard to the refusal to consider defence witnesses. However, it did confirm the Split County Court's decision not to allow re-examination of witnesses following the amendment to the indictment by stating that "it is not an essential breach (*bitna povreda*) if the court refuses consider some proposed evidence seeing as ... evidence is considered to be all the facts which the court considers important for reaching a just judgment. [The Split County

Court's] position regarding rehearing the witnesses was explained in its judgment." As the Supreme Court gave no other consideration to breaches of criminal procedure, it is likely it intended this statement to be adequate in all cases alleged by the defence as being breaches of criminal procedure.

The geographical or ethnic origin of witnesses should never categorically have been a reason for their rejection by any independent and impartial court. However, Amnesty International also notes that since 1996, the progress in the peace process in Bosnia-Herzegovina has meant not only that residents of Republika Srpska are able to exercise much greater freedom of movement, but also notes a significant thaw in relations between Croatia and Bosnia-Herzegovina to the extent that Croatia has opened a consulate in Banja Luka.

Procedural violations with regard to identification of the accused and his role

As noted in the description of the legal proceedings above, of the eight former camp inmates who were able to identify Mirko Graorac, only three were able to state they had seen him on more than a few isolated occasions, and all had either seen photographs of him beforehand or identified him at the trial when it was clear he was the defendant. The court made no attempt to have any of the suspects describe Mirko Graorac physically before the courtroom identification took place, and similarly the three who identified Mirko Graorac from the line-up were not asked to describe him physically before the identification took place.

According to the Croatian Code of Criminal Procedure then in effect, witnesses who identify a suspect first must describe or give indications by which the individual can be distinguished, and only subsequent to that are to indicate which individual, placed among other unknown persons, it is. It specifies that where possible the persons should be of a similar type (Article 223). As noted above, three of the witnesses had chosen Mirko Graorac out of a line-up, although Mirko Graorac has made allegations that for two of them (VU and ĐT) this process had been conducted unlawfully, and the other had said he had seen a photograph of Mirko Graorac prior to the identification taking place. Although some witnesses at the main trial were questioned about or volunteered information about his uniform and dress while he was allegedly in Manja...a camp, none were asked to describe Mirko Graorac's physical appearance before being asked to turn around and identify him from the courtroom. The lawyer repeatedly asked to have recited into the court record the fact that the defendant was sitting in the spot in the courtroom reserved for the defendant, flanked on either side by uniformed police officers. Mirko Graorac's photograph had been widely published in Croatia by the print and electronic media before the trial. Some of the witnesses testified that they had been shown photographs of Mirko Graorac during their initial questioning. As a result, it may be the case that none of the identifications of the witnesses fulfilled the Croatian Code of Criminal Procedure's requirements.

Two of the witnesses (ĐT and DDñ) admitted in court to conferring with other former detainees about whether Mirko Graorac had been at the camp before testifying. One was ĐT, who participated in the line up (and who Mirko Graorac claims was brought into the room where he was being interrogated), and was not equivocal in his recognition of Mirko Graorac. He testified that while at Manja...a, "...I heard that there was a person named Graorac, who was the commander of the external guard. Always when [other prison inmates] mentioned Graorac, I assumed that they meant a Graorac who I knew [was an officer] in Banja Luka... only when I was out [of Manja...a] did I... see when they told me that this was in fact Graorac, that I realized it wasn't the same officer)." (Split County Court record of 4 March 1996). He also testified that he had not been convinced of Mirko Graorac's identity, and testified that "when during these procedures a photograph was published in the newspapers, [I spoke with a former inmate of Manja...a and asked] ... is this really that Mirko Graorac from Manja...a, and [the former inmate] confirmed yes that he knew him well and this person was at Manja...a." (Split County Court record of 4 March 1996). That former inmate was not one of the witnesses who testified at the trial.

However, the identification of Mirko Graorac by the witnesses was critical to the guilty judgment not only with regard to his having been at Manja...a, but also as to the fact that he was the commander. The Split County Court judgment stated: "As no one brought this circumstance [that Mirko Graorac was the commander of the external guards] into question in the course of proceedings, and bearing in mind the testimony of witnesses who were at Manja...a, who recognized the accused, this court considers that circumstance established beyond doubt." The Supreme Court confirmed this decision of the Split County Court by noting "practically all of the examined witnesses had been in consensus that the accused had during the incriminating time been in the position of commander of the 'external guard of the reserve militia of Republika Srpska' in the concentration camp Manja...a near Banja Luka, allegations which the accused did not even attempt to dispute, and it was not disputed that they were all detained in Manja...a camp and had direct experience about it/him [reference ambiguous in Croatian language, pronoun (*njemu*) could refer to the camp (*logor*) or Mirko Graorac]". (Page 3, Supreme Court judgment). However, the defence did not question whether Mirko Graorac was the commander in Manja...a because it summarily rejected the allegations that he was in the camp at all.

Reference to his responsibility as commander for preventing crimes by his subordinates were equally vague. As noted above, the Tribunal has stated that "in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences" („*elebifi* judgment, para 378). The County Split County Court stated, that the "external guard" was particularly and systematically brutal, and stated with an explanation of only one sentence: "when that is taken into perspective, and when it is taken into perspective that the defendant was the commander of the "external guard" then anyway (*u svakom slu...aju*) he must be considered

responsible for the behaviour of that "external guard". The court continued to explain that according to some witnesses Mirko Graorac had been present at the time beatings took place, and "the presence of the accused during these acts speaks to the point that as commander he was responsible for the behaviour of the external guard during those moments." In a similar fashion, the judgment found Mirko Graorac responsible for the inhumane conditions, lack of medical treatment, night-time "roll-calls", and searches and confiscation of valuable belongings.

Lawyer unable to conduct a defence

Another essential component of the right to a fair trial is the right of the accused to have adequate time and facilities to conduct a defence (Article 6[3][b] of the European Convention and Article 14[3][b] of the ICCPR).

One of the chief prosecution witnesses was alleged by the defendant to have, as a secret service officer, participated in the initial interrogation of Mirko Graorac. This witness was one of the two who had chosen Mirko Graorac from a line-up and was the first to testify against him in investigative and main hearing proceedings. Mirko Graorac's objections on the grounds that the witness had been present at the interrogation was registered in the court record when the same witness testified at the main hearing, as well as during the pre-trial procedure when the identification was conducted. When the defence tried to cross-examine this witness regarding his participation in the interrogation of Mirko Graorac, he refused to answer, citing a legal provision which prohibits witnesses from revealing state secrets in court. The Split County Court rejected a defence motion to establish, via the Ministry of Defence and legal means, whether this witness had participated in the initial interrogation of Mirko Graorac, which may have cast doubt on that witness by showing that he had an interest in securing a conviction. Given that this witness was particularly vital to the defence, the refusal to permit an inquiry into his credibility seriously affected the ability to conduct a defence.

Regarding its rejection, the Split County Court stated in its defence that "this judgment is not based only on the testimony of witness [VU], rather his testimony is one of numerous testimonies which emerged during this procedure, and that witness's testimony was considered in relation to other evidence." (Page 22 of the Split County Court judgment). Given the fact that few other witnesses testified directly about Mirko Graorac's role in Manja...a with any detail, Amnesty International cannot agree with the court's decision that his testimony was insignificant.

Amnesty International's conclusions and recommendations

The initial proceedings before the Split County Court in the first trial of Mirko Graorac were unfair. Mirko Graorac was denied the opportunity to summon witnesses or to otherwise conduct

his defence, and the process of identification of Mirko Graorac by witnesses, which was the primary basis for the judgment, may have violated Croatian procedural obligations. The Supreme Court failed to acknowledge this wrongdoing in its consideration of Mirko Graorac's appeal. Although the Supreme Court ordered a retrial, it did so only to ascertain whether witnesses who were detained in Manja...a were prisoners of war or civilians, confirming the first-instance court's judgment on other counts. Amnesty International fears that the retrial may result in a miscarriage of justice.

As long as there is doubt as to whether the trial of Mirko Graorac was fair, the court's guilty verdict will not contribute to the cause of justice for the thousands of victims of human rights abuses who were detained in Manja...a prison camp. Amnesty International recommends that the Croatian authorities take the following steps to prevent a possible miscarriage of justice:

1) The Split County Court should ensure that the retrial of Mirko Graorac includes a rehearing of the evidence so that all the procedural violations can be rectified, and in particular:

- C the defence should be given opportunity to summon all witnesses whose testimony would be relevant, including those who can testify to Mirko Graorac's alibi. The court should not give greater weight to the testimony of any witness or discount such testimony on inappropriate grounds such as ethnicity or nationality;**
- C the defence should be given opportunity to challenge prosecution evidence including background information on the nature of Manja...a camp;**
- C Mirko Graorac's lawyer should be given every opportunity to conduct his defence, including the ability to obtain information which may cast doubt on a witness's credibility;**
- C given the judgment's reliance on the identification of Mirko Graorac, the Split County should be particularly attentive to the possible procedural violations which took place during the identification of the accused. Any eyewitness identification which were made in violation of the national criminal procedure safeguards should be excluded.**

2) Given the importance of this and other war crimes cases in Croatia to achieving justice for the thousands of victims of human rights violations, the Croatian authorities should avail themselves of the opportunity for transparency in the proceedings by, in accordance with the "Rules of the Road" within the Rome Agreement of February 1996, establish procedures to allow the Tribunal to review case files before pursuing

prosecutions. Given that the trial of Mirko Graorac is to be returned for retrial, the Croatian authorities should also submit the case of Mirko Graorac on the question of whether the evidence is sufficient and whether the Tribunal Prosecutor wishes to pursue the prosecution herself.

3) The Croatian authorities should instigate full, independent, and impartial investigations into the allegations that Mirko Graorac was tortured or ill-treated during detention.